U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BLAINE R. GALE and DEPARTMENT OF THE ARMY,
USA MEDDAC, Fort Drum, NY

Docket No. 98-654; Submitted on the Record;
Issued October 5, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly refused to reopen appellant's claim for further consideration on the merits under 5 U.S.C. § 8128(a) of the Federal Employees' Compensation Act on the grounds that the application for review was not timely filed within the one-year time limitation period set forth in 20 C.F.R. § 10.138(b)(2) and that the application failed to present clear evidence of error.

On September 21, 1992 appellant, then a 52-year-old warehouse worker, was injured at work when he slipped and fell while attempting to unload pallets off a truck. Appellant was a temporary employee at the time of his injury and his employment was terminated on September 29, 1992. The Office accepted the claim for contusions of the left ribs, back syndrome with radiculitis. Appellant received continuation of pay for time off of work from September 23 to September 29, 1992 and compensation for wage loss from September 30, 1992 until February 3, 1993.

In a report dated January 20, 1993, Dr. George Mina, a Board-certified orthopedist, noted that appellant slipped and fell at work on September 21, 1992, at which time he suffered pain in the rib cage and upper back. He noted that after a few days appellant also developed pain in the lower back. Dr. Mina diagnosed low back syndrome with left nerve root radiculitis. He prescribed bed rest, moist heat, medication and back exercises.

In a work evaluation form dated March 23, 1993, Dr. Mina approved appellant for limited duty with restrictions including that he not lift over 10 pounds.

Appellant was offered a light-duty job and returned to work on September 20, 1993.[1]

[1] Appellant was later laid off from work on December 21, 1993.

In an October 6, 1993 report, Dr. Mina noted that appellant complained of continuing back pain and that he had lifted a garage door a few days before the examination which made the pain worse. He concluded that appellant continued to have low back syndrome and that he should remain on limited duty.

Appellant filed a claim alleging a recurrence of disability on April 23, 1994.[2]

In an attending physician's report dated June 22, 1994, Dr. Mina advised that he last examined appellant on April 27, 1994 for back pain. He noted that appellant was capable of performing regular work with restrictions on June 27, 1994. Dr. Mina offered no explanation as to how the alleged recurrence of disability on April 27, 1994 was related to the accepted work injury of September 21, 1992.

In a decision dated October 3, 1994, the Office denied appellant's claim for a recurrence of disability. The Office specifically determined that appellant's alleged recurrence of disability on April 23, 1994 was the result of an intervening event and was not a natural consequence or progression of the September 21, 1992 work injury.[3]

By letter dated October 17, 1994, appellant requested an oral hearing.

In a March 15, 1995 letter, the Office notified appellant that an informal hearing was scheduled for April 27, 1995.

By letter dated May 18, 1995, the Office advised appellant that his hearing request was considered to be abandoned since he failed to appear at the scheduled hearing or show good cause why he failed to attend the hearing.

On February 20, 1996 appellant filed an appeal with the Board.

By letter dated January 23, 1997, in response to appellant's submission of new evidence on appeal, the Board notified appellant that it had no jurisdiction to review that evidence and advised him that he had the option of proceeding with his appeal or submitting the new evidence to the Office along with a request for reconsideration.

On March 19, 1997 the Board issued an order dismissing appellant's appeal. The Board noted in the order that appellant had expressed his intent to submit new evidence to the Office in a letter dated January 31, 1997. Thus, the Board returned the case file to the Office for further proceedings.

In a July 26, 1997 letter, appellant requested reconsideration and submitted copies of medical evidence already of record. He also submitted: (1) physical therapy treatment notes

[2] According to appellant, he was attempting to walk into a drug store on April 23, 1994 when his left leg and hip went into a paralyzed state causing him to fall onto his hands, arms and face.

[3] The Office specifically noted that, in an October 6, 1993 report, appellant's treating physician stated that appellant experienced a worsening of his low back symptoms after he lifted a garage door.

dating from October 19, 1992 to July 30, 1993; (2) a December 9, 1996 letter from the Social Security Administration awarding benefits; (3) a copy of a privacy release form; (4) a witness statement from Gene L. Jesmer, appellant's landlord; and (5) an x-ray report dated September 21, 1994.

In a decision dated October 20, 1997, the Office noted that it considered appellant's January 31, 1997 letter to the Board to be an untimely request for reconsideration as it was not filed within one year of the last merit decision of record dated October 3, 1994. Nonetheless, the Office performed a limited review of the record and determined that there was no factual support in the record from which to conclude that appellant notified the Office, three weeks in advance, that he would be unable to attend his scheduled hearing. The Office also found that appellant failed to present clear evidence of error with regard to the October 3, 1994 decision denying compensation. The Office, therefore, refused to reopen appellant's case for a merit review.

The Board finds that the Office properly found that appellant's reconsideration request was not timely filed and that such request did not present clear evidence of error.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.[4] As appellant filed his appeal with the Board on December 19, 1997, the only decision properly before the Board is the Office's October 20, 1997 decision denying appellant's request for reconsideration on the merits.[5]

Section 8128(a) of the Act[6] does not entitle a claimant to a review of an Office decision as a matter of right.[7] This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[8] The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).[9] As one such limitation, the Office has stated that it will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that

[4] *See* 20 C.F.R. § 501.3(d)(2).

[5] The Board has no jurisdiction to review the Office's ruling as to whether appellant abandoned his hearing request as that decision was issued on May 18, 1995, more than one year prior to appellant's December 19, 1997 appeal.

[6] 5 U.S.C. § 8128(a).

[7] *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[8] Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application."

[9] Thus, although it is a matter of discretion on the part of the Office whether to review an award for or against payment of compensation, the Office has stated that a claimant may obtain review of the merits of a claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a point of law or a fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office; *see* 20 C.F.R. § 10.138(b)(1).

decision.[10] The Board has found that the imposition of this one-year limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).[11]

In the instant case, appellant's request for reconsideration was dated July 26, 1997.[12] Since this is more than one year after the October 3, 1994 decision denying appellant's claim for recurrence of disability, the request is untimely.

In those cases where a request for reconsideration is not timely filed, the Board has held, however, that the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.[13] In accordance with Office procedures, the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.138(b)(2), if the claimant's application for review shows "clear evidence of error" on the part of the Office.[14]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[15] The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.[16] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[17] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[18] This entails a limited review by the Office of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.[19] To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office decision.[20] The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the

[10] 20 C.F.R. § 10.138(b)(2).

[11] *See Leon D. Faidley, Jr., supra* note 7.

[12] The Office properly noted that certain "implied" requests for reconsideration submitted before the Board and dated as early as January 27, 1997 were still untimely filed.

[13] *Leonard E. Redway*, 28 ECAB 242 (1977).

[14] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996).

[15] *See Dean D. Beets*, 43 ECAB 1153 (1992).

[16] *See Leona N. Travis*, 43 ECAB 227 (1991).

[17] *See Jesus D. Sanchez, supra* note 7.

[18] *See Leona N. Travis, supra* note 16.

[19] *See Nelson T. Thompson*, 43 ECAB 919 (1992).

[20] *Leon D. Faidley, Jr., supra* note 7.

part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.[21]

The Office properly found in the present case that appellant submitted no new and relevant evidence in conjunction with his reconsideration request to demonstrate that the Office committed error in denying appellant's claim for recurrence of disability.[22] The majority of the medical evidence submitted by appellant on reconsideration was already of record.[23] Although appellant submitted a September 21, 1994 x-ray report, the Office correctly noted that the x-ray evidence standing alone fails to show that appellant's alleged recurrence of disability on April 23, 1994 was causally related to the accepted work injury of September 21, 1992. Moreover, the witness statement from appellant's landlord cannot substantiate that appellant sustained a recurrence of disability as that issue is a medical issue and the witness is not a medical expert.[24]

Because appellant's evidence submitted on reconsideration does not *prima facie* shift the burden of proof in appellant's favor, or establish clear evidence of error, the Board finds that appellant has failed to meet the standard. Therefore, the refusal of the Office to reopen appellant's claim for a review on the merit was proper.[25]

[21] *Thankamma Mathews*, 44 ECAB 765, 770 (1993); *Gregory Griffin*, 41 ECAB 458 (1990).

[22] The Office failed to note that appellant submitted a copy of a Social Security Administration decision. The Office's error, however, is harmless since the findings of other administrative agencies are not determinative with regard to proceedings under the Act; *see Donald E. Ewals*, 45 ECAB 111 (1993). Thus, the Social Security Administration decision is insufficient to establish clear evidence of error. Additionally, the Board notes that the privacy release form is not relevant.

[23] Since a physical therapist is not a physician for the purposes of the Act, the physical therapy notes submitted by appellant on reconsideration are not regarded as medical evidence and are therefore not sufficient to *prima facie* shift the burden of proof in favor of appellant and establish clear evidence of error; *see Jane A. White*, 34 ECAB 515 (1983).

[24] As part of his initial burden of establishing a recurrence of disability, appellant was required to present a rationalized medical opinion, based on a complete factual and medical background, showing causal relationship; *see Sandra Dixon-Mills*, 44 ECAB 882 (1993).

[25] Appellant submitted additional evidence to the Office after the issuance of the October 20, 1997 decision denying merit review. He also submitted new evidence to the Board on appeal. The Board has no jurisdiction to review evidence submitted by appellant subsequent to the Office's October 20, 1997 decision or for the first time on appeal; *see* 20 C.F.R. § 501.2(c).

The decision of the Office of Workers' Compensation Programs dated October 20, 1997 is hereby affirmed.

Dated, Washington, D.C.
October 5, 1999

Michael J. Walsh
Chairman

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member